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Twenty-eighth session

SUMMARY RECORD OF THE 568th MEETING

Held at the Vienna International Centre, Vienna,
on Tuesday, 16 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

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The meeting was called to order at 2.10 p.m.

ELECTRONIC DATA INTERCHANGE: DRAFT MODEL LAW (*continued*) (A/CN.9/406, A/CN.9/407, A/CN.9/409 and Add.1-4)

Article 6 (*continued*)

1. **The CHAIRMAN** invited the Commission to continue consideration of paragraph (1). The proposal made by the United Kingdom at the previous meeting concerned agency. It might therefore be regarded as a drafting matter, since substantively the issue of agency had been addressed earlier in the draft by the words "or on whose behalf" in the definition of the term "originator" in article 2. Admittedly the Commission had not yet approved the definition.

2. **Mr. ABASCAL ZAMORA** (Mexico) said that the signature referred to in draft article 6 might be that of the individual who actually signed the message and not that of the originator. The United Kingdom proposal was therefore pertinent and deserved consideration. He suggested as an alternative that, in the introductory wording, the words "of any person" should be inserted after the word "signature" and that subparagraph (a) should read: "a method is used to identify that person in the data message as the person signing it and to indicate that person's approval of the information contained therein; and".

3. **Mr. UCHIDA** (Japan), supported by **Mrs. ZHANG Yuejiao** (China), endorsed the Chairman's comments and favoured the retention of the text approved by the Working Group.

4. **Mr. CHOUKRI SBAI** (Observer for Morocco) regarded the United Kingdom proposal as a matter of substance, not of drafting. Since draft article 6 dealt with the individual who actually signed the message, that individual, whether the originator or the originator's agent, should be identified.

5. **Mr. AL-ZEID** (Observer for Kuwait) said that, bearing in mind the observations made by Germany and Spain at the previous meeting, he too favoured the retention of the Working Group's text. The question of agency should be kept out of the Model Law and left for determination in accordance with relevant domestic law.

6. **The CHAIRMAN** said there seemed to be little support for the United Kingdom proposal. He therefore took it that the Commission approved draft article 6 (1) as worded by the Working Group.

7. *It was so agreed.*

Article 7

8. **Mr. SORIEUL** (Secretariat) said that the Commission would probably wish to focus its attention on the questions of display of information contained in a data message and the criteria used to assess the integrity of the information, dealt with in subparagraph (a) of paragraph (1) and in paragraph (2) respectively.

9. **Mr. CHAY** (Singapore) said that article 7 went to the very foundations of the idea of the reliability of a paper document. In its written comments (see document A/CN.9/409), Singapore had observed that the requirement in paragraph (1) (a) for display of the information in a data message to the person to whom

(Mr. Chay, Singapore)

it was to be presented ignored reality, in that in many electronic data interchange systems data messages were processed automatically and thus were never displayed to anyone. The display requirement also raised the question of the kind of data to be displayed — would it be the raw alphanumeric data, usually unintelligible, or the final message, rendered intelligible by processing?

10. In regard to the integrity of the information contained in a message, his Government's written comments also criticized the use of the notion of reliable assurance in paragraph (1) (b) as being unclear. The essential point was to establish that a message had remained unaltered from start to finish, and was therefore an original document. In order to deal with those two points, his delegation proposed the replacement of paragraphs (1) and (2), as drafted by the Working Group, by the texts reproduced in Singapore's comments in document A/CN.9/409.

11. **Ms. BOSS** (United States of America) said that, while her delegation could accept article 7 as it stood, the considerations raised by Singapore called for a response, particularly its point that information transmitted by an EDI system was meant primarily to be usable rather than displayable intelligibly throughout. There were jurisdictions in which information was required to be presented in its original form, for example to a judicial body, and others in which it was required merely to be retained. The Model Law should distinguish between those two situations. She therefore proposed the insertion of the words "retained or" before the word "presented" in the introductory wording of paragraph (1).

12. She believed that Singapore's main concern — the display problem — might be met if the matters dealt with in the present subparagraphs (a) and (b) were handled in reverse order. She therefore proposed that the present subparagraph (b) should become subparagraph (a), with a drafting change consisting in the replacement of the words "between the time when it was first composed in its final form, as a data message or otherwise, and the time when it is displayed" by the words "from the time when it was first composed in its final form, as a data message or otherwise".

13. The principal requirement — the existence of reliable assurance — having thus been put first, it should be followed, after the conjunction "and", by a provision about display, a question which became important only if the information in the message was required to be presented to an individual. Accordingly, for the second subparagraph, she proposed the replacement of the wording at present forming subparagraph (a) by the following subparagraph (b): "where it is required that the information be presented, that information is displayed to the person to whom it is to be presented".

14. In reply to a question from **Mr. MADRID** (Spain), **Ms. BOSS** (United States of America) said that the new subparagraphs should be linked by the conjunction "and" because the integrity condition had to be met regardless of whether a display requirement existed.

15. **Mr. CHAY** (Singapore) said that his delegation's concerns were met by the proposals of the United States representative.

16. **Mr. ALLEN** (United Kingdom) found the United States proposal sensible and a helpful way of dealing with the issues raised by Singapore. However, in order to meet fully the Singaporean delegation's concern that information required to be presented should be intelligible, he suggested replacing the words "is displayed" in the subparagraph (b) proposed by the United States by the words "is capable of being displayed".

17. **Ms. CLIFT** (Australia) endorsed the United Kingdom representative's suggestion. It would bring article 7 into line with article 5, which spoke of accessibility of the information contained in a data message.

18. **Ms. BOSS** (United States of America) accepted the United Kingdom representatives's suggestion.

19. **The CHAIRMAN** said that, if he heard no objection, he would take it that the Commission approved article 7 (1) as proposed by the United States with the change suggested by the United Kingdom representative.

20. *It was so agreed.*

21. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that, as a consequence of the Commission's decision with regard to paragraph (1), the words "subparagraph (b)" in paragraph (2) should be amended to read "subparagraph (a)".

22. *It was so agreed.*

23. **Ms. CLIFT** (Australia) noted the decision of the Working Group, reflected in paragraph 162 of document A/CN.9/406, that, for reasons of consistency in terminology, the word "generated" should replace the word "composed". She asked why the word "composed" appeared in paragraphs (1) and (2) of the text of article 7 now under consideration.

24. After a discussion in which **Mr. ALLEN** (United Kingdom), **Ms. BOSS** (United States of America), **Mr. GRIFFITH** (Australia) and **Mr. SCHNEIDER** (Germany) took part, **Mr. SORIEUL** (Secretariat) said that the wording as it appeared in the annex to document A/CN.9/406 was that proposed by the drafting group at the Working Group's twenty-eighth session. On revising the report of the drafting group, the Working Group had decided to change "composed" to "generated" for reasons of consistency, but that change had accidentally not been taken into account in the final version annexed to the report. The two terms were perhaps synonymous but, unless the Commission wished to change the text as adopted by the Working Group, the word "generated" should be used throughout the article.

25. **Mr. UCHIDA** (Japan) said that, when dealing with the requirement of integrity of the information contained in a data message, the Guide should explain how the words "from the time when it was first generated in its final form" would apply in practice. His delegation had raised that point in its written comments (see document A/CN.9/409/Add.1).

26. **The CHAIRMAN** said that the Secretariat would address that point in the draft Guide.

27. **Mr. BISCHOFF** (Observer for Switzerland) said that it was difficult to know what was understood by the term "displayed" ("*exposée*"). Did it refer to the time a message was received on a person's computer or the time at which it was received on a central computer, even if addressed to a particular person? He asked for clarification in the Guide.

28. **Mr. SORIEUL** (Secretariat) said that the word "displayed" had caused translation difficulties. The question was related not so much to the time of reception as to the circumstances under which a computerized message could be shown in an acceptable way, specifically for someone who had no computerized system, for instance a judge. That point could be addressed in the Guide.

29. **The CHAIRMAN** said that paragraph (3) did not seem to require discussion. He took it that the text of article 7 was acceptable as amended.

Article 8

30. **Ms. BOSS** (United States of America) noted that Singapore had proposed a number of changes to article 8, presented in document A/CN.9/409. The proposals in subparagraphs (a), (b), (e) and (f) were drafting suggestions that should be considered by the drafting group. She supported the amendment proposed in subparagraph (g), which was substantive in nature.

31. **Mr. ALLEN** (United Kingdom) said that he supported the amendment suggested by Singapore in subparagraph (a) and had no difficulty with the change proposed in subparagraph (e). Depending on changes made elsewhere in the draft, the amendment proposed in subparagraph (f) deserved consideration.

32. **Mr. GRIFFITH** (Australia) pointed out that a firm mandate had to be given to the drafting group by the Commission. It was the drafting group's duty to ensure that the language chosen expressed what was intended by the Commission, but decisions rested with the Commission. He proposed that the first sentence of paragraph (2) be deleted as unnecessary.

33. **The CHAIRMAN** said that, when matters were referred to the drafting group, the understanding was that the drafting group would not make any policy changes but merely clarify the language.

34. **Ms. BOSS** (United States of America) said that her delegation had no problems with article 8 as it stood. She did not support the deletion of the first sentence of paragraph (2) as proposed by Australia, because that sentence instructed tribunals to give due weight to electronic data messages. That would be valuable in some jurisdictions, even if not in all.

35. **Mr. FARADI ARAGHI** (Islamic Republic of Iran) said that it would be best to delete the first sentence of paragraph (2). Directions to courts would not be accepted in all legal systems. The remainder of paragraph (2) should be kept.

36. **Mr. SHANG Ming** (China) suggested that the word "processed" be inserted in the third line of paragraph (2), after "stored".

37. **The CHAIRMAN**, after inviting members to indicate whether they were for or against the proposals just made, noted that the majority wished to retain the first sentence of paragraph (2) and that the proposal to insert the word "processed" in the second sentence was not supported.

38. **Mr. GRIFFITH** (Australia) said that he supported amendments (a), (b), (c), (e), and (f) proposed by Singapore in document A/CN.9/409; however, he did not support amendments (d) and (g).

39. **The CHAIRMAN**, after inviting members to indicate their attitude to the changes originally recommended by the Government of Singapore (A/CN.9/409) and now supported by the representative of Australia, noted that there was general support for replacing "value" by "weight" in the title, for replacing "admission" by "admissibility" in the *chapeau* of paragraph (1), for replacing "grounds" by "sole ground" in paragraph (1) (a) and for deleting "presented" after "information" in the first sentence of paragraph (2). The majority seemed to be against the proposal to replace "stored" in the third line of paragraph (2) by "retained".

40. **Mr. GRIFFITH** (Australia) said that that proposal to use the word "retained" would make the text more consistent. Thus, the word "retention" was used in the title of article 9, and the word "retained" in the body of that article. The use of different terms in different articles of the Model Law could lead to confusion. If the Commission considered that there was no material difference between the words "stored" and "retained", he would prefer that the latter be used throughout for the sake of consistency.

41. **Mr. ALLEN** (United Kingdom) said that it would be difficult to replace "storage" by "retention" in paragraph (2) (a) of article 7, which referred to "any change which arises in the normal course of communication, storage and display".

42. **Ms. BOSS** (United States of America) said her delegation did not object to using the word "retention" rather than "storage" where appropriate, but inconsistencies in the use of the two terms occurred throughout the text. She did not think the Commission should spend time trying to ensure consistency, but should simply instruct the Secretariat to bear the need for consistency in mind when drafting the final version.

43. **Mr. ANDERSEN** (Observer for Denmark) said that, since in his country the Model Law would have to be translated, it would be useful to know whether the Commission regarded "storage" and "retaining" as synonymous. It should be borne in mind that in computer technology the word "storage" was more commonly used.

44. **Mr. GRIFFITH** (Australia) supported that view, and added that the word "storage" was frequently used in article 2 ("Definitions").

45. **Mr. MADRID** (Spain) said that the drafting group had discussed the two terms and had decided to use both, on the grounds that some parts of the Model Law referred simply to retention in the general sense, and others to the specific process of storage. He would support the suggestion that the text be reviewed to ensure that the right word was used in the right context. If it was decided to use only one term, his delegation would prefer "storage".

46. **Ms. BOSS** (United States of America) supported that view.

47. **Mr. CHAY** (Singapore) thought that the consensus in the Working Group had been that there was no substantive difference between the two terms, but that it would be preferable to use only one for the sake of consistency.

48. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that he also preferred the term "storage".

49. **Mr. HOWLAND** (United Kingdom) said that the two words carried marginally different meanings in different contexts; he thought it would be best to leave it to the Secretariat to decide which was the most appropriate. His delegation would prefer both words to be used in the Model Law.

50. **The CHAIRMAN** said he took it that the Commission wished to entrust the Secretariat with the task of choosing the most appropriate word according to the context.

51. *It was so agreed.*

52. **The CHAIRMAN** drew attention to an error in paragraph (3) of article 8, "article 8" should be replaced by "article 7".

53. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that the reference should now be to subparagraph (a) rather than subparagraph (b) of paragraph (1) of article 7.

54. **Mr. GRIFFITH** (Australia) said the text as it stood did not read well. The intent of the provision was to ensure that, where subparagraph (a) of paragraph (1) of article 7 was satisfied, information that was not in its original form should be accorded the same weight in legal proceedings as information that was in its original form. The phrase "Subject to any other rule of law" would destroy the provision's effect, since there might well exist another rule of law providing the exact contrary. In addition, it was not clear what comparison was being made by the use of the phrase "shall not be accorded any less weight".

55. He proposed that paragraph (3) should be amended to read: "Where subparagraph (a) of paragraph (1) of article 7 is satisfied in relation to information in the form of a data message, in any legal proceedings information not presented in its original form shall be accorded the same weight as information presented in its original form".

56. **Mr. UCHIDA** (Japan) said he understood that the need for paragraph (3) had been extensively discussed in the Working Group. However, his delegation still considered the paragraph unnecessary, since its intent was already covered by paragraph (2) of article 8, even where custom or practice required that information be presented in its original form. He therefore proposed that paragraph (3) be deleted.

57. **Ms. BOSS** (United States of America) said her delegation favoured retention of paragraph (3), with the two amendments proposed by the Australian delegation.

58. **Mr. ALLEN** (United Kingdom) supported the first Australian amendment, but objected to the second. It was important to refer back to information which satisfied subparagraph (a) of paragraph (1) of article 7 by using the words "the information" rather than "information". More importantly, it was not the intention of the Model Law to require the courts to accord particular weight to particular information.

59. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) shared that view.

60. **Mr. BROQVIST** (Observer for Sweden), **Mr. SCHNEIDER** (Germany), **Mr. MÄKELÄ** (Finland), **Ms. ZHANG Yuejiao** (China), **Mr. BOSSA** (Uganda), **Mr. MADRID** (Spain), **Ms. REMSU** (Observer for Canada) and **Mr. RAUSCHER** (Austria) supported the Japanese proposal for deletion of paragraph (3).

61. **The CHAIRMAN**, after inviting members to indicate their attitude to the proposal, noted that there was majority support for deletion of paragraph (3).

The meeting was suspended at 3.55 p.m. and resumed at 4.25 p.m.

Article 9

62. **Mr. SORIEUL** (Secretariat), introducing article 9, said that apart from paragraph (1) (c), which specified the type of transmittal information that could be omitted without affecting the integrity of the stored record, article 9 had presented few difficulties for the Working Group.

63. **Mr. BURMAN** (United States of America) suggested that the words "date and time of transmission" in paragraph (1) (c) should be replaced by the words "accompanying transmittal information". Different systems provided different kinds of transmittal information. The retention of transmittal information was a reasonable requirement but the retention of specific information which might not be retained by the system should not be required.

64. **Mr. GRIFFITH** (Australia) noted that paragraph (1) (c) began with a reference to "transmittal information associated with the data message". The suggestion of the United States representative would mean referring to "transmittal information" twice. Perhaps the reference to date and time of transmission could be deleted?

65. **Mr. CHOUKRI SBAI** (Observer for Morocco) was in favour of maintaining paragraph (1) (c) as it stood. It was very important to mention the date and time of a data message. In some countries, including his own, it was a legal requirement that documents should be dated. He suggested that the end of paragraph (1) (c) should read: "...date and time of transmission, and any other accompanying information, is retained".

66. **Mr. BURMAN** (United States of America), responding to the observation by the representative of Australia, proposed that the subparagraph should be abridged to read "transmittal information associated with the data message is retained".

67. One of his problems with the present text was that it could be interpreted more restrictively than intended. It was important to avoid setting an unduly high standard.

68. **Mr. ALLEN** (United Kingdom) suggested that the words "including, but not limited to, originator, addressee(s)", should be replaced by the words "including, but not limited to, the identity of the originator and the addressee(s)".

69. **Mr. MADRID** (Spain) said that he wished to return to the question of the use of the terms "retention" and "storage". It would be useful if, particularly in relation to article 9, the Commission could give guidance to the drafting group on the matter.

70. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that he preferred the term "storage" to "retention".

71. **Mr. GRIFFITH** (Australia) said that he agreed with the proposal of the representative of the United States of America to abridge paragraph (1) (c); the shorter version seemed to cover all eventualities.

72. With regard to the terms "retention" and "storage", although he was anxious to ensure consistency and was generally in favour of using the term "storage", he felt that article 9 really was concerned with retention rather than storage, as stated in its heading "Retention of data messages".

73. **Mr. ALLEN** (United Kingdom) and **Mr. CHAY** (Singapore) agreed with the proposal to abridge paragraph (1) (c).

74. **The CHAIRMAN**, after inviting delegations to indicate whether they were for or against the proposal by the representative of the United States of America to abridge paragraph (1) (c), noted that a majority seemed to support the proposal.

75. **Mr. RAUSCHER** (Austria) said that, in his view, the abridgement of paragraph (1) (c) would have implications for the commentary on article 9 in the draft Guide (A/CN.9/407). In particular, additional examples of the type of transmittal information referred to in the subparagraph would have to be provided.

76. **Mr. ABASCAL ZAMORA** (Mexico) said that the transmittal information accompanying data messages was sometimes very detailed and the Working Group had decided that it was not necessary to retain it all. In his view, the shorter version of the subparagraph was unduly vague. A considerable amount of compensatory clarification would have to be included in the Guide, which was not, however, a binding instrument of law.

77. **Mr. MADRID** (Spain) said that the abridgement of the subparagraph would impede rather than facilitate the use of electronic media, since a data message would be admissible in evidence only if all transmittal information had been retained. He therefore supported the proposal to include a detailed explanation of the retention requirement in the Guide.

78. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that he fully agreed with the representatives of Austria and Mexico on the need to expand the commentary in the Guide. The information specified in the Working Group's version — originator, addressee, date and time — was extremely important and the abridged version of paragraph (1) (c) was general and ambiguous.

79. **The CHAIRMAN** said that the draft Guide could be amended to reflect the concerns expressed by the previous speakers.

80. **Ms. EKEMEZIE** (Nigeria) said that it might be helpful to insert the word "all" before "transmittal" in the abridged version of paragraph (1) (c).

81. **Mr. ABASCAL ZAMORA** (Mexico) said that the Working Group's version of the subparagraph had allowed for the elimination of superfluous information that occupied a large amount of storage space. It had furthermore established the minimum requirement for a data message to be admissible in evidence. He noted, for example, that some systems did not retain the time and date of transmission. Compliance with the requirement laid down in the new version might be insufficient for the purpose of legal proceedings.

The meeting rose at 5.05 p.m.